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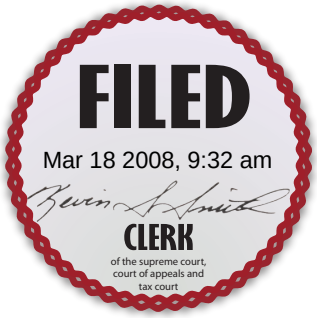

IN THE
COURT OF APPEALS OF INDIANA

DELMAS SEXTON, II,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 02A03-0708-CV-419
	)	
LORI GROSS, ERIC ZIMMERMAN, and ALLEN COUNTY PROBATION DEPARTMENT,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Stephen S. Spindler, Special Judge
Cause No. 02D01-0307-MI-6658

March 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Delmas Sexton II (Sexton), appeals the trial court's grant of Appellees-Defendants', Lori Gross, Eric Zimmerman, and Allen County Probation Department (collectively, Appellees), Motion to Dismiss for Failure to Prosecute pursuant to Indiana Trial Rule 41(E).

We affirm.

ISSUE

Sexton raises one issue on appeal, which we restate as: Whether the trial court abused its discretion by dismissing Sexton's Request for Production of Public Records for failing to prosecute.

FACTS AND PROCEDURAL HISTORY

On July 16, 2003, Sexton filed a Verified Petition for Production of Public Records. On September 10, 2003, Appellees filed their answer to Sexton's petition. On September 30, 2003, Appellees' counsel contacted Sexton by letter, offering to produce all requested documents that were not specifically exempted from public disclosure by Indiana law in exchange for Sexton's stipulation for dismissal of his cause with prejudice. On October 3, 2003, Sexton replied, refusing Appellees' offer and instead requesting a settlement conference. On February 5, 2004, and July 26, 2005, respectively, Sexton filed a Notice of Amended Appearance with the trial court. Thereafter, on May 4, 2007, new counsel for Appellees entered his appearance and filed a Motion to Dismiss for Failure to Prosecute under Ind. Trial Rule 41(E). Sexton filed another appearance on May 14, 2007, as well as a Motion to Set Respondent's Motion to Dismiss for a Hearing and Motion to Deny. On June

25, 2007, the trial court conducted a hearing on Appellees' Motion to Dismiss. On the same day, the trial court granted Appellees' motion and dismissed Sexton's action.

Sexton now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Sexton appeals the trial court's T.R. 41(E) dismissal of his lawsuit for failure to prosecute. We will reverse a T.R. 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*. We will affirm if there is any evidence that supports the decision of the trial court. *Id.*

Indiana Trial Rule 41(E) provides in pertinent part:

> [W]hen no action has been taken in a civil case for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

The purpose of this rule is "to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution." *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993), *reh'g denied*. "The burden of moving the litigation is upon the plaintiff, not the court. It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court's power to do so. *Id.* "Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the

adverse party should be considered. He should not be left with a lawsuit hanging over his head indefinitely." *Hill v. Duckworth*, 679 N.E.2d 938, 939 (Ind. Ct. App. 1997).

Courts of review generally balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purpose of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part. *Belcaster*, 785 N.E.2d at 1167. "The weight any particular factor has in a particular case appears to depend on the facts of the case." *Lee v. Friedman*, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994). However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay. *Id*.

This is exactly the case here. A span of more than three years separates Sexton's request for a settlement conference and Appellees' motion to dismiss. During this period, Sexton did not take any action in this cause beyond sporadically filing amended appearances with updated addresses. Only after Appellees filed their Motion to Dismiss was Sexton spurred into action. Furthermore, the record establishes that during the hearing on the

motion, Sexton failed to give the trial court a specific explanation for this lengthy delay. Instead, Sexton blamed his incarceration for the lack of progress in his case.

Sexton now contends that "action" as used in T.R.41(E) does not impose a duty on him to "file" documents with the trial court. (Appellant's Br. pp. 4-5). Rather, he insists that the "action" in this case amounted to the ongoing negotiations. Specifically, he claims he was awaiting a response from the Appellees to his counteroffer. Sexton's argument aside, we still fail to discern any "action" in this case. Appellees communicated their settlement offer on September 30, 2003. Three days later, on October 3, 2003, Sexton countered with his request for a settlement conference. Silence reigned since then. During the subsequent three years, Sexton did not even attempt to get in touch with Appellees' counsel to ensure that she had actually received his counteroffer, let alone, undertake any significant action to bring his case to a conclusion. As we stated before, Sexton carried the burden of moving the litigation forward. *See Benton*, 622 N.E.2d at 1006. He clearly failed to do so here. Accordingly, we conclude that the trial court appropriately granted Appellees' Motion to Dismiss.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in dismissing Sexton's cause of action pursuant to T.R. 41(E).

Affirmed.

KIRSCH, J., and MAY, J., concur.